

BEFORE THE TENNESSEE BOARD OF WATER QUALITY, OIL AND GAS

Homebuilders Association of Tennessee,)	
)	
Petitioner,)	
)	
v.)	NPDES Permit No. TNS000000
)	
Tennessee Department of Environment and)	No. _____
Conservation, Division of Water Resources,)	
)	
Respondent.)	

PETITION FOR APPEAL

The Homebuilders Association of Tennessee ("Petitioner"), pursuant to Tenn. Code Ann. § 69-3-105(i), Tenn. Comp. R. & Reg. Ch. 0400-40-05-.12, and Tenn. Code Ann. § 69-3-110(a) hereby appeals certain conditions contained in the NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems ("sMS4s") No. TNS000000 issued on September 30, 2016 ("Permit") by the Tennessee Department of Environment & Conservation ("TDEC"), Division of Water Resources ("Division").

Petitioner appeals the terms and conditions of the Permit relating to permanent stormwater management because such terms and conditions are more stringent than the minimum requirements of federal law and violate the prohibitions set forth in Tenn. Code Ann. §§ 69-3-108(s) and (t).

Parties and Jurisdiction

1. This permit appeal is brought pursuant to Tenn. Code Ann. § 69-3-105(i) and Tenn. Comp. R. & Reg. Ch. 0400-40-05-.12, which authorize an aggrieved person to file a permit appeal based on any of the issues commented upon during the public comment process or

changes from the draft permit. The hearing is subject to the provisions of Tenn. Code Ann. § 69-3-110(a) and the Uniform Administrative Procedures Act at Tenn. Code Ann. § 4-5-301 *et seq.*

2. The Petitioner is a Tennessee not-for-profit corporation. Its agent for service of process is Susan Ritter, 213 5th Avenue North, Suite 200, Nashville, Tennessee 37219-1926. Service of process for purposes of this matter only shall be made upon the undersigned.

3. The Commissioner of TDEC is authorized under Tenn. Code Ann. § 69-3-108(g) to "grant permits authorizing the discharges for activities under [Tenn. Code Ann. § 69-3-108(b)]. The Commissioner is also authorized under Tenn. Code Ann. § 69-3-108(l) to issue a general permit "where the Commissioner finds that a category of activities or discharges would be appropriately regulated under a general permit..."

4. The Commissioner may delegate his authority to the Division pursuant to Tenn. Code Ann. § 69-3-107(13), and has delegated that authority to the Director of the Division of Water Resources.

Regulatory Framework

5. 33 U.S.C. § 1342(b) authorizes the United States Environmental Protection Agency ("EPA") to delegate to states the authority to administer the National Pollutant Discharge Elimination System ("NPDES") permitting program. EPA has delegated that authority to the State of Tennessee. The Permit is issued as a NPDES permit by the Commissioner under Tenn. Code Ann. § 69-3-108.

6. 33 U.S.C. § 1342(p)(3)(B)(iii) authorizes NPDES permits for discharges for municipal separate storm sewer systems ("MS4s") on a system or jurisdiction wide basis that would among other things require controls to reduce the discharge of pollutants to the maximum extent practicable ("MEP").

7. 40 CFR § 122.28 allows the issuance of a general permit to cover a category of discharges.

8. Pursuant to 40 CFR § 122.33, MS4s are required to seek coverage under a NPDES permit issued by the Commissioner, and may be covered under a general permit by submitting a Notice of Intent ("NOI") that includes the information on the SMS4s best management practices and measureable goals required by 40 CFR § 122.34(d).

9. 40 CFR 122.34(b) requires the SMS4 to implement six minimum control measures designed to reduce the discharge of pollutants to the MEP. One of those minimum control measures is post-construction storm water management in new development and redevelopment. § 122.34(b)(5).

10. Pursuant to 40 CFR § 122.34(d)(2), a SMS4 that obtains coverage under a general permit is not required to meet any measurable goals identified in the NOI to demonstrate compliance with the minimum control measures except to the extent that a state has provided or issued a menu of BMPs that addresses such minimum measures.

11. Although Tenn. Code Ann. §§ 69-3-108(g) and (l) authorize the Commissioner to issue the Permit, Tenn. Code Ann. § 69-3-108(s) prohibits the Commissioner from issuing any NPDES permit to a local governmental entity administering a municipal separate storm sewer system where such NPDES permit would impose post-construction storm water requirements that are more stringent than the minimum requirements of federal law. Further, this section requires that any such NPDES permit allow the local governmental entity administering a MS4 discretion in selecting measures to meet any applicable numeric or narrative effluent limitations.

12. Tenn. Code Ann. § 69-3-108(t) further provides that the State cannot require any local governmental entity that administers a municipal separate storm sewer system under a

NPDES permit to impose control measures for post-construction storm water that exceed the minimum requirements of federal law.

Factual Allegations

13. The Petitioner is a not-for-profit trade association comprised of approximately 3,000 professional builders, developers, and associated firms engaged directly or indirectly in home building, remodeling, and light commercial construction.

14. Petitioner's members develop and construct new homes throughout the State of Tennessee in areas designated as sMS4 communities. This development includes acquisition of land, developing the site, installing subdivision infrastructure, roads, and drainage features.

15. Petitioner's members are adversely affected by the Permit because the Permit contains requirements more stringent than federal law in violation of Tenn. Code Ann. § 69-3-108(s) and (t), and compliance with measures more stringent than federal law causes direct pecuniary impact through dedication of land and cost of construction. These increased costs cannot always be passed along to the buyer or tenant.

16. Petitioner's members are also subjected to additional regulatory burden and enforcement exposure.

17. The Petitioner is an aggrieved person within the meaning of Tenn. Code Ann. § 69-3-105(i) and Tenn. Comp. R. & Reg. Ch. 0400-40-05-.12, and provided written and oral comments at the public hearing and during the comment period. This appeal is based on issues that were provided in such written and oral comments.

18. On February 25, 2016, the Division issued Public Notice of its intent to issue the sMS4 Permit. The Petitioner provided oral comments at the public hearing on April 27, 2016 and submitted written comments during the public comment period.

19. On September 30, 2016, Petitioner was notified by email that the Division had issued the final sMS4 Permit to be effective October 1, 2016. The Division did not provide a public notice of the issuance of the sMS4 Permit as required by Tenn. Code Ann. § 69-3-105(i).

20. Small MS4s that choose to obtain coverage under the Permit must comply with the terms and conditions of the Permit, including Section 4.2.5 relative to post construction stormwater management for new development and redevelopment.

21. The Permit at Section 4.2.5 establishes 100 percent retention or infiltration of stormwater flow, velocity or quantity as MEP.

22. The Permit at Section 4.2.5.2 contains permanent stormwater standards and concludes, among other things, that the retention or infiltration of the Water Quality Treatment Volume ("WQTV") as a stormwater control measure ("SCM") is MEP. It also deems permanent stormwater design performance standards detailed in the previous version of the Permit issued on August 31, 2010 to satisfy permanent stormwater design standards of the current Permit. The previous version of the Permit also imposed a SCM as retention or infiltration of the first inch of rainfall as a permanent stormwater design standard.

23. The MEP determinations related to retention or infiltration in 4.2.5.2 rely on control of flow, velocity and quantity of stormwater from among other sources impervious surfaces.

24. The Permit at Section 4.2.5.2.1 provides exceptions to full compliance with the WQTV, but such exceptions are predicated entirely on first meeting or complying with retention or infiltration of the WQTV.

25. The Permit at Section 4.2.5.2.2 defines the WQTV as runoff generated from impervious surfaces during the first inch of a rainfall event. The WQTV for new development

can be reduced but such reduction is predicated entirely on whether the permittee can first meet or comply with the retention of infiltration of the WQTV.

26. The Permit at Section 4.2.5.2.3 provides an offsite mitigation or payment into a public stormwater fund to provide offsets for not meeting the WQTV.

27. The Permit at Section 4.2.5.2.4 mandates permanent water quality riparian buffers for New Development Projects that contain streams to provide *additional* water quality treatment even if over and above SCMs that are designed to remove 100 percent of pollutants. These buffer zones range from 30 feet to 60 feet top of bank.

28. The Permit at Section 4.2.5.3 requires sMS4s to provide necessary codes and ordinances to implement the requirements in the Permit including those listed above. Petitioner's members must comply with such codes and ordinances when enacted.

29. The Permit at Section 4.2.5.4 requires the sMS4s to provide review, approval and enforcement procedures to review, approve and enforce the requirements in the Permit including those listed above. Petitioner's members will be subject to such procedures.

30. The Permit at Section 4.2.5.5 requires the sMS4s to meet performance standards in Section 4.2.5.2 and provide full treatment capacity within 72 hours following the end of the preceding rain event. Maintenance procedures are for the life of the New Development Project for measures imposed by the Permit including those listed above.

31. The Permit at Section 4.2.5.6 requires sMS4s to inventory and track SCMs including those listed above.

Claims for Relief

32. The Clean Water Act ("CWA") NPDES permitting authority is limited to regulating the discharge of pollutants from point sources into waters of the United States, based

upon the capabilities of the practices or technologies available to control such discharges. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B).

33. Under the CWA the term "discharge of a pollutant" is defined at 33 U.S.C. § 1362(12) as "[t]he addition of any pollutant to navigable waters from any point source. . . "

34. Under the CWA the term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

35. Under the CWA, a pollutant, as defined in 33 U.S.C. § 1362(6), does not include flow, velocity, or quantity and accordingly flow, velocity or quantity do not constitute a "discharge of pollutants." Nor are flow, velocity or quantity surrogates for a pollutant. The requirement to remove 100 percent of pollutants from the first inch of rain is a regulation of stormwater flow, velocity or quantity and, as such, exceeds the federal minimum NPDES requirements.

36. Impervious surfaces are not point sources as defined in the CWA. Such non-point source runoff cannot be regulated under the NPDES stormwater permitting program. To the extent the Permit regulates discharges from impervious surfaces like finished homes and lots, such requirements exceed the federal minimum NPDES requirements.

37. Ditches and storm drains are not waters of the United States and runoff from finished homes and lots are not discharges into waters of the United States subject to regulation under the NPDES stormwater permitting program. To the extent the Permit regulates such discharges, such requirements exceed the federal minimum NPDES requirements.

38. Federal law and regulations do not contain a precise definition of MEP. EPA regulations recognize that pollutant reductions that represent MEP may be different for each SMS4 given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Accordingly, each SMS4 determines the appropriate best management practices ("BMP") to satisfy the minimum control measures. 64 Fed. Reg. at 68,7854 (December 8, 1999). To the extent the Permit defines MEP and imposes mandatory BMP measures to meet the defined MEP standard, the Permit exceeds the federal minimum NPDES requirements.

39. TDEC has not provided documented research and analyses that identify specific technologies that SMS4s could rely upon that would achieve the purposes of the Permit in a cost effective manner which is required by federal law; therefore, the Permit is arbitrary and capricious.

40. To the extent not otherwise stated above the Permit exceeds the minimum federal NPDES authority in violation of Tenn. Code Ann. § 69-3-108(s) and (t) in all sections of 4.2.5, including but not limited to any regulation of flow, velocity or quantity, discharges from impermeable surfaces, interpretation of MEP for SMS4s, and requirements for riparian buffers. These sections specifically include: (i) 4.2.5.1 relative to imposition of MEP described in the Permit; (ii) 4.2.5.2 relative to permanent stormwater standards; (iii) 4.2.5.2.1 related to site specific limitations to infiltration, evapotranspiration, or capture/reuse of the entire WQTV; (iv) the WQTV described at 4.2.5.2.2; (v) the requirements related to off-site stormwater mitigation or payment into public stormwater fund, to the extent such requirement is the result of requiring impermissible restrictions on flow, velocity or quantity stormwater; (vi) the requirement in 4.2.5.2.4 to establish, protect and maintain Water Quality Riparian Buffers particularly where

other BMPs are able to remove pollutants from points sources to the MEP; and (vii) Sections 4.2.5.3, 4.2.5.4, 4.2.5.5, 4.2.5.6 to the extent they relate to the any of the other challenged Sections of the Permit.

41. Further, by requiring SMS4s to adopt codes and ordinances to implement the Permit, the SMS4s will violate Tenn. Code Ann. § 69-3-108(s) and (t) because such codes and ordinances will be more stringent than minimum requirements of federal law.

42. Further, by mandatorily defining MEP as either narrative or numeric effluent limitation, the Permit removes SMS4 discretion in selecting measures to meet best management practices in violation of Tenn. Code Ann. § 69-3-108(s).

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, the Petitioner hereby appeals the Permit and requests:

1. That this appeal be accepted and docketed such that a scheduling conference may be conducted by the Administrative Judge within thirty (30) days of the filing of the Petition in accordance with Tenn. Code Ann. § 69-3-110(a).

2. That a hearing be scheduled so that it may be concluded within 180 days from the scheduling conference as required by Tenn. Code Ann. § 69-3-110(a) or at such other mutually agreeable date.

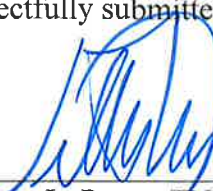
3. That the Administrative Judge find that the Permit violates Tenn. Code Ann. § 69-3-108(s) and (t) by imposing requirements more stringent than the minimum requirements of federal law.

4. That the Administrative Judge order the Permit be modified to delete all requirements in the Permit that are in violation of Tenn. Code Ann. § 69-3-108(s) and (t).

5. That the Administrative Judge order such other, further and general relief to which it may be entitled.

DATED this 28th day of October, 2016.

Respectfully submitted,



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